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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CINDY THAO, Defendant and Appellant.	C093825 (Super. Ct. No. 05F10435)

Defendant Cindy Thao appeals the trial court's denial of her petition for resentencing under Penal Code section 1170.95.[1] She contends the trial court erred when it found the prosecution proved beyond a reasonable doubt she was ineligible for resentencing because she was a major participant in the murder who acted with reckless indifference to human life. Defendant also contends she is entitled to a jury trial on any facts in her petition not previously decided by a jury and section 1170.95 violates her right to equal protection. We disagree and shall affirm.

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[1] Undesignated statutory references are to the Penal Code.

I. BACKGROUND

On February 1, 2007, defendant pled no contest to first degree murder (§ 187, subd. (a)), and admitted the enhancement allegation that a principal in the crime was armed with a firearm (§ 12022, subd. (a)).

A. Plea and Sentence

The factual basis for defendant's plea was as follows:

On November 21, 2005, "defendant . . . along with her codefendants Simona Saechao, Y[e]ng Yang, and Bee Vue went to the Gold Star motel. [¶] There was a plan for the four of them to commit a robbery on . . . Mai Vang and . . . Bee Lee. [¶] When they arrived at the motel, the victim, Mai Vang, was seated in a pick-up truck. [¶] Mr. Vue and Mr. Yang . . . approached the vehicle with guns. Mr. Vue . . . contact[ed] . . . the victim, Mai Vang, [and] demanded his wallet. [¶] When Mr. Vang said he did not have a wallet, Mr. Vue pulled Mr. Vang out of the car, at which time a struggle ensued over the gun. Mr. Vue shot the gun three times, killing the victim, Mr. Vang. [¶] . . . [¶] Ms. Thao was the driver of the vehicle which brought the individuals to the motel where Mr. Vang was killed and the attempted robbery occurred. [¶] In addition, prior to the time they came to the motel, she had discussed the plan to do the robbery with the other three co-defendants. [¶] In addition, she also gave her weapon, a .38-caliber revolver, to the other co-defendant, Mr. Yang[,] to use during the commission of this attempted robbery."

The trial court sentenced defendant to 26 years to life. At sentencing, the trial court stated, "[Defendant], after sitting through [your codefendant's] trial, it was clear to me that you were the driving personality, the will, the force, the person that made this happen, and for that reason the sentence imposed today is the proper sentence as harsh as it is."

B. Preliminary Hearing and Trial Testimony

We summarize the relevant testimony from the preliminary hearing as augmented by the trial of codefendant Bee Vue:

Officers found the victim Mai Vang shot to death in the parking lot of the motel. They also located only 9-millimeter bullet casings near the body.

Earlier that evening, Vang had called Bee Lee and asked Lee to meet him at a fast-food restaurant. Defendant also called Lee. Defendant invited Lee to hang out with her and her friend Simona Saechao. The four met up at the restaurant and then went to the motel together. An arrangement was made for Vang to have sex with Saechao in exchange for money, with Lee paying the fee.

Lee and defendant then left the hotel room together. Despite their arrangement, defendant told Lee that Saechao did not want to have sex with Vang. Lee responded he had already paid for it, so Saechao should do it. Lee left the motel property.

When Lee returned to the motel, Vang was waiting for him outside the door of their motel room. Vang appeared upset and asked for the keys to Lee's truck. Lee gave Vang the truck keys and Lee went into the room.

Meanwhile, the women also left the motel, and in the car defendant told Saechao they were going to get their friend Bee Vue to go back and rob the victim. Saechao said she did not want to be part of this plan. Defendant insisted.

When they found Vue, defendant told Vue and Yeng Yang of her plan to rob the victim Vang. According to Saechao, Vue did not want to participate, however, defendant pushed him to participate. Defendant told the police when she met up with Vue, he is the one that said he wanted to "do a quick lick."[2]

For his part, Yang testified defendant and Saechao were talking to Vue when he first saw them. After they finished talking, Vue came over to Yang and said defendant and Saechao had gotten into trouble and they were planning to rob the men at the motel. Vue invited Yang to join in and shared defendant's plan.

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[2] A lick is a robbery.

The plan was to bring Vue's 9-millimeter gun and defendant's .38-caliber revolver to the motel and have Saechao go up to the room and see if the men were still there. When the victims opened the door, one of the men would kick Saechao out of the way and go into the room to rob the victims.

The group got back into the car and defendant drove them to the motel. On the way, Yang told Vue he did not have a gun. Vue said Yang could use defendant's gun. Defendant gave Vue her purse with the gun, and Vue, in turn, gave the gun to Yang.

When they got to the motel, Yang testified defendant told Saechao to get out and go find the victims. Saechao heard both defendant and Vue give her this direction. After she got out of the car, Saechao saw the victim sitting in a pick-up truck. She ran back to the car to report what she saw. Saechao said they should forget this plan and go back home. Vue agreed. Vue and defendant spoke in Hmong for a moment (a language Saechao does not speak or understand).

Immediately after that conversation, at Vue's direction, defendant parked the car about seven feet behind the truck. Yang saw Vue take out his gun and verify it was loaded just before they got out of the car, and the men got out. Saechao did not see any guns in the hands of Vue or Yang when they got out of the car.

From her vantage in the back seat, Saechao saw Vue get into a fight with the victim Vang. She then heard a gunshot. She heard a second gunshot and saw Vue and the victim on the ground. She then saw Vue shoot the victim in the back. For her part, defendant told officers she saw Vue and Yang go up to the truck where Vue and the victim Vang exchanged words, and then she heard three or four shots.

At this point, defendant yelled, "let's go!" The men got back in the car. After they started to drive away, defendant reversed the car so Vue could retrieve his beanie, and then they drove off. As they drove away, defendant told Saechao she should not say anything or everyone would get caught for the murder.

Lee heard the three gunshots while he was in the hotel room. He looked out the window of his room and saw Vang on the ground next to his truck. Lee also saw defendant's car pulling out of the parking lot.

Officers detained defendant the next day. They found a loaded .38-caliber firearm in her purse and several rounds of .38-caliber bullets in the glove box of her car. At first, defendant denied knowing anything about the murder. When confronted with what the police knew, defendant implicated Vue, Saechao, and Yang. When questioned by the police, Yang and Vue denied knowing anything about the crime.

C. Trial Court Ruling

In 2019, defendant filed a form petition for resentencing under section 1170.95. Defendant's petition alleged she pled guilty to first or second degree murder because she believed she could be convicted of those offenses pursuant to the felony-murder rule or the natural and probable consequences doctrine. She checked the box stating she could not now be convicted of murder due to the changes made to sections 188 and 189, effective January 1, 2019. She requested appointment of counsel and checked the boxes stating she was not the actual killer, did not act as an accomplice with the intent to kill, and was not a major participant in the crime or acted with deliberate indifference to human life.

The trial court appointed counsel for defendant, found defendant established a prima facie showing under section 1170.95, and set the matter for an order to show cause hearing (OSC). At the OSC, the parties agreed the trial court could review the preliminary hearing transcript, the transcripts of defendant's plea and sentencing, and the transcript from the trial of her codefendant Vue.

After the submission of the evidence noted above and briefing, the trial court denied the petition in a 15-page written ruling. The trial court summarized the testimony provided at the preliminary hearing, the information provided at the plea and sentencing hearings, and additional relevant facts about defendant's involvement from Vue's trial.

The court identified the parties' differing positions on the appropriate standard of proof to be applied in these proceedings, and concluded under either standard, the prosecution had met its burden to prove defendant was a major participant who acted with reckless indifference to human life.

The trial court independently reviewed the factors identified in *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*) to answer the question of whether defendant was a major participant in the crime and acted with reckless disregard for human life. On the question of being a major participant, the court found the robbery was defendant's idea, she planned it, and gathered the participants. She drove the key participants to the robbery, remained close while it happened, and did not assist the victim when he was shot. She supplied a handgun to one of the robbers and was aware of the dangers of the robbery.

On the question of whether she acted with reckless disregard for human life, the trial court found in addition to planning the robbery, defendant provided one of the two guns used. The court found defendant was the driving force in the crime. She was physically present at the crime. She failed to counsel the perpetrators not to fire their weapons. Rather, defendant gave her gun to one of the robbers once the other confirmed his gun was loaded. She did not render aid to the victim. The court found after the shooting, defendant returned to gather incriminating evidence and told everyone not to talk about the event. In mitigation, the court noted the robbery occurred in a remote location and quickly so as to minimize violence to others. Based on these facts, the court found "ample evidence would support a finding that [defendant] was (1) a major participant in the burglary/robbery, who (2) acted with reckless indifference to human life such that her conviction remains valid."

II. DISCUSSION

Defendant contends the evidence in this case was not sufficient to find beyond a reasonable doubt she could be convicted of murder under current law. She first argues

our standard of review is de novo and the evidence fails to meet that standard. She also argues the trial court's determination of factual issues denied her the right to a jury trial and violated equal protection. We disagree.

A. Senate Bill No. 1437

Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill 1437), which took effect on January 1, 2019, limited accomplice liability under the felony-murder rule and eliminated the natural and probable consequences doctrine as it relates to murder, to ensure a person's sentence is commensurate with his or her individual criminal culpability. (Stats. 2018, ch. 1015, § 1(f); *People v. Gentile* (2020) 10 Cal.5th 830, 842-844.) Senate Bill 1437 amended sections 188 and 189.

Section 188, which defines malice, now provides, in part: "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).) Section 189, subdivision (e) now limits the circumstances under which a person may be convicted of felony murder: "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) [(defining first degree murder)] in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."

Senate Bill 1437 also added section 1170.95.[3] This section allows those "convicted of felony murder or murder under a natural and probable consequences theory [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial . . . . [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, former subd. (a).)

Here, in accordance with section 1170.95, subdivision (c), the trial court reviewed the petition, determined defendant made a prima facie showing she was entitled to relief, appointed counsel for defendant, and issued an OSC. The court then conducted the required OSC hearing. In rendering its decision defendant was ineligible for resentencing, the trial court examined the transcripts for the plea, the sentencing, the preliminary hearing, and the trial of codefendant Vue.

B. Standard of Review

Defendant argues because the trial court decided this issue "on the cold paper record" by solely reviewing the transcripts of the plea hearing, sentencing hearing, preliminary hearing, and codefendant's trial, our appellate review of the trial court's decision should be de novo. The appellate courts that have considered the standard of

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[3] References in this opinion to section 1170.95 refer to the version in effect at the time the trial court ruled on this petition. (Stats. 2018, ch. 1015, § 4.) The Legislature further amended section 1170.95 effective January 2022 under Senate Bill No. 775 (2020-2021 Reg. Sess.). This amendment to section 1170.95 has no impact on the issues raised by this appeal.

review for appeals of the denial of a petition under section 1170.95 have uniformly held the proper standard is the substantial evidence test. (*People. v. Clements* (2022) 75 Cal.App.5th 276, 301; *People v. Hernandez* (2021) 60 Cal.App.5th 94, 113-114; *People v. Williams* (2020) 57 Cal.App.5th 652, 663-664.) We agree the substantial evidence test applies to our standard of review.

C. Sufficiency of the Evidence

The key question to be resolved in this case as to whether defendant was ineligible for resentencing was whether she was a major participant in the crime who acted with reckless disregard for human life. (§ 189, subd. (e)(3).) Substantial evidence supports the trial court's finding that she was.

"The scope of our review for substantial evidence is well settled. The test is not whether the People met their burden of proving beyond a reasonable doubt that [defendant] was ineligible for resentencing, but rather 'whether *any* rational trier of fact could have' made the same determination, namely that '[t]he record . . . disclose[s] . . . evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find [as did the superior court]. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the [order] the existence of every fact the [superior court] could reasonably have deduced from the evidence. [Citation.] "Conflicts [in the evidence] . . . subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge . . . to determine the . . . truth or falsity of the facts upon which a determination depends." ' " (*People v. Williams, supra,* 57 Cal.App.5th at p. 663.)

Our Supreme Court provided a nonexclusive list of factors to assist in making the determination whether a defendant was a "major participant" in a felony murder, namely—"What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the

nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?" (*People v. Banks, supra,* 61 Cal.4th at p. 803, fn. omitted.) Importantly, the *Banks* court stated, "No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant's participation 'in criminal activities known to carry a grave risk of death' [citation] was sufficiently significant to be considered 'major.' " (*Ibid*.)

"Reckless indifference to human life has a subjective and an objective element. [Citation.] As to the subjective element, '[t]he defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed,' and he or she must consciously disregard 'the significant risk of death his or her actions create.' [Citations.] As to the objective element, ' "[t]he risk [of death] must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him [or her], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." ' [Citations.] 'Awareness of no more than the foreseeable risk of death inherent in any [violent felony] is insufficient' to establish reckless indifference to human life; 'only knowingly creating a "grave risk of death" ' satisfies the statutory requirement." (*In re Scoggins* (2020) 9 Cal.5th 667, 677.) To determine whether defendant had the requisite mental state, "[w]e analyze the totality of the circumstances" in a manner that largely overlaps with our "major participant" discussion. (*Ibid*.) As our Supreme Court has explained, " '[a]lthough we state these two requirements separately, they often overlap,' " " 'for the greater the defendant's participation in the felony murder, the more likely that he [or she] acted with reckless indifference to human life.' " (*Clark, supra,* 63 Cal.4th at p. 615.)

In *Clark, supra*, 63 Cal.4th at pages 615 to 623, our Supreme Court laid out the interrelated factors to ascertain whether a participant in a crime acted with reckless indifference. These factors include: the defendant's knowledge of weapons and the use and number of weapons in the crime; the defendant's presence at the crime and opportunities to restrain the crime and/or aid the victim; the duration of the felony; the defendant's knowledge of the cohort's likelihood of killing; and the defendant's efforts to minimize the risk of violence during the felony. (*Id.* at pp. 618-622.)

There was substantial evidence demonstrating defendant was a major participant. Defendant conceived of and planned this robbery. As the original judge stated at sentencing, defendant was the "driving personality, the will, the force, the person that made this [murder] happen." She gathered the participants and drove them to the scene of the crime. She overcame repeated objections expressed to her plan.

She was aware of the particular dangers of her plan, as she supplied her gun to Yang to commit the robbery and knew Vue was armed as he checked his gun in the car while sitting next to her. When they got to the scene of the crime, defendant directed Saechao to go upstairs and see if the men were in the room, setting up a dangerous potential ambush in a motel hallway.

Defendant stayed in close proximity to the crime as it unfolded. She sat in the driver's seat of a car parked seven feet behind the pick-up truck and watched her team execute her plan. After they killed the victim, she started to drive away with the perpetrators. She backed up to collect incriminating evidence and then drove away and admonished each participant to keep quiet. We conclude substantial evidence supports the trial court's finding defendant was a major participant in the crime.

We consider next whether defendant acted "with reckless indifference to human life." Two guns were used in this crime. Defendant admitted as part of her plea she carried a gun and gave it to Yang. She handed her purse, containing her gun, to Vue to hand to Yang when he said he was unarmed. Defendant knew Vue was armed with a gun

during the crime because he verified it was loaded while sitting next to her in the car. The evidence supports the conclusion defendant knew her own gun was loaded when she handed it to Vue to give to Yang, as police officers found it loaded in her purse the next day.

We conclude defendant's proximity to the murders and the events leading up to them is also significant in assessing her reckless indifference to human life. Where a defendant "had ample opportunity to restrain the crime and aid the victims" but "did neither," "the high court [found] they exhibited reckless indifference to human life." (*In re Scoggins, supra*, 9 Cal.5th at p. 678; see *Tison v. Arizona* (1987) 481 U.S. 137, 157-158.)

Here, defendant sat in a car directly behind the victim and watched the fight and murder. As soon as they got to the motel, defendant directed Saechao to go see if the victim was in his room, setting up the potential to violently storm the room for the robbery. Defendant could have kept her own gun instead of dedicating it to the fight. She could have attempted to restrain the others or dissuade them from committing the robbery. She could have told Vue and Yang to not use their weapons during the robbery. After they shot the victim, she also could have attempted to aid the victim. But she did none of these things. Once the victim was shot, she shouted, "let's go!" and drove off. The only thing she did was to stop and remove incriminating evidence before they departed.

Similarly, these same facts support the conclusion defendant failed to take efforts to minimize the risk of violence. (*Clark, supra*, 63 Cal.4th at p. 622 ["a defendant's apparent efforts to minimize the risk of violence can be relevant to the reckless indifference to human life analysis"].)

Finally, the evidence supports the conclusion defendant knew the participants were likely to use lethal force. A defendant's "knowledge of factors bearing on a cohort's likelihood of killing . . . may be evident before the felony or may occur during

the felony." (*Clark, supra*, 63 Cal.4th at p. 621.) Here, defendant sought out Vue and knew he was armed with a loaded gun prior to setting the robbery in motion. Further, she armed Yang with her own revolver.

We conclude substantial evidence exists to support the finding defendant acted with reckless disregard for human life. The trial court did not err in finding defendant not eligible for resentencing. (§§ 189, subd. (e)(3), 1170.95, subd. (d).)

D. Right to a Jury Trial

Defendant argues the section 1170.95 petition procedure denies her the right to a jury trial on new factual determinations about her liability because the judge makes these determinations. This contention has been uniformly rejected. (See, e.g., *People v. James* (2021) 63 Cal.App.5th 604, 608-609, and cases cited therein.) As noted in *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156, "[t]his argument is unpersuasive because the retroactive relief [convicted defendants] are afforded by Senate Bill 1437 is not subject to Sixth Amendment analysis. Rather, the Legislature's changes constituted an act of lenity that does not implicate defendants' Sixth Amendment rights."

E. Equal Protection

Defendant also argues the Legislature violated the equal protection clause of the constitution because defendants tried after the effective date of Senate Bill 1437 receive a jury trial on all elements of murder, while those who were tried prior to its effective date are limited to a judge's decision, not a jury trial, on any facts not previously decided by a jury. We reject this claim.

Defendant has not cited any authority recognizing an equal protection violation arising from the timing of the effective date of an ameliorative change in the law. (See *People v. Floyd* (2003) 31 Cal.4th 179, 188 [acknowledging that the effective date of all legislation is arbitrary, but rejecting an equal protection claim on that basis].) Numerous courts, however, have rejected that claim. (*Ibid.*) Retroactive application of such a change in the law " 'is not a question of constitutional right but of legislative intent.' "

(*People v. Lizarraga* (2020) 56 Cal.App.5th 201, 210.) Our Supreme Court has generally recognized that the Legislature has a rational reason for refusing to make an ameliorative change in the law fully retroactive to all criminal defendants: "[A]ssur[ing] that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written." (*In re Kapperman* (1974) 11 Cal.3d 542, 546.)

Further, as noted in *People v. Clements, supra,* 75 Cal.App.5th at page 297, the Legislature made a reasoned decision that bears a rational relationship to the differing treatment of those convicted before and after the effective date of Senate Bill 1437. On the one hand, the Legislature could have required that all qualifying offenders be given a new trial. (*Ibid.*) On the other hand, the Legislature could have completely refused to make the benefits of the law available to those already convicted. (*Ibid*.) Instead "[t]hey chose the middle course of requiring trial judges to decide the critical factual questions based—at least in some cases—on a cold record. While the Legislature's compromise is not perfect, it is adequate." (*Ibid.*)

III. DISPOSITION

The order denying defendant's petition for resentencing is affirmed.

/S/

RENNER, J.

We concur:

/S/

ROBIE, Acting P. J.

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MAURO, J.